United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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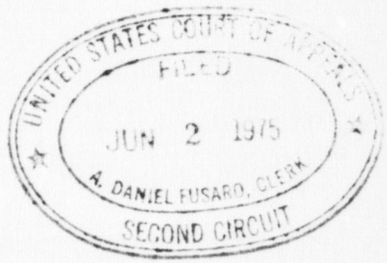

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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75-5009

In the Matter of

No. 75-5009

M. E. GREEN CO., INC.,

Bankrupt.

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BRIEF OF APPELLEE, MICHAEL E. GREEN, IN SUPPORT OF A MOTION TO DISMISS APPEAL

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BRIEF OF APPELLEE, MICHAEL E. GREEN, IN SUPPORT OF A MOTION TO DISMISS APPEAL

This brief is submitted in support of a motion on behalf of MICHAEL E. GREEN, one of the appellees herein and a party to the settlement approved by the Bankruptcy Judge below and by the District Court Judge on appeal. At issue in this motion to dismiss the appeal are questions of law relating to the capacity of the appellant to appeal to this Court and relating to that which the appellant may appeal in this Court. More specifically, two issues of law are raised on this motion, as follows:

1. May a party such as the appellant, who claims to be a general creditor in a bankruptcy proceeding, appeal the approval of a settlement in the Bankruptcy Court, to this Court, where he is not directly affected by the settlement approved in the Bankruptcy Court, or where he is not an aggrieved party?

2. May a party such as appellant, who was in default in his participation in the settlement proceeding in the Bankruptcy Court, appeal the determination after committing the default, and if so, to what extent may he appeal?

P O I N T I

APPELLANT HAS NO STANDING TO APPEAL

In order to appeal as of right to this Court, a party must be directly affected by the order appealed from, or he must be an aggrieved party within the meaning of the Bankruptcy Act. Appellant's motion for supersedas seems to infer that the appellant may appeal to this Court as of right. Nowhere in his motion papers, however, does appellant state the authority for this position. It would appear that appeals to this Court as of right from proceedings in bankruptcy are governed by the Bankruptcy Act. Section 25 of the Bankruptcy Act refers to an "aggrieved party." "A party is 'aggrieved' within the meaning of the Bankruptcy Act if his property may be diminished, his burden increased, or his rights detrimentally affected by the order sought to be reviewed." Klein v. Rancho Montana de Oro, Inc., 263 F. 2d 764, at page 771.

In the case at bar, the appellant SILVERMAN is not directly affected by the settlement order approved of below

and he cannot be considered to be an "aggrieved party" within the meaning of the Bankruptcy Act. Appellant's property has not been diminished by the order approving the settlement, nor has his burden been increased, or his rights detrimentally affected by the order of settlement. Appellant may contend that his property is diminished by the approval of the settlement because of an invalid contention that if the settlement were not approved, and the litigations continued, he might receive a larger dividend in the bankruptcy proceeding, provided that he would be entitled to receive a dividend in any case. Such a contention on the part of the appellant is meritless for two significant reasons: Firstly, the position is speculative at best. Secondly, a general creditor's interest in a dividend has been held not to constitute a direct interest so as to fall within the definition of an aggrieved party by diminishment of his property. 2 Collier on Bankruptcy, Section 25.08.

Analysis of the proceedings below clearly indicates that the appellant does not have standing to appeal to this Court, and accordingly, the appeal should be dismissed.

P O I N T II

ASSUMING THAT APPELLANT, AS A GENERAL CREDITOR, HAS STANDING TO APPEAL, THE EXTENT THAT HE MAY APPEAL BECAUSE OF HIS DEFAULT BELOW IS LIMITED. THE APPEAL SOUGHT BY APPELLANT GOES FAR BEYOND HIS LIMITED RIGHT TO APPEAL AND SHOULD THEREFORE BE DISMISSED.

In the District Court a motion was made to dismiss the appeal and came on to be heard before HON. MILTON POLLACK. At that stage of the proceeding, there were three specific areas sought to be appealed by the Notice of Appeal filed by the appellant, as follows:

> "1. From the denial by the Court of an application for adjournment requested by Alex L. Rosen, Esq., attorney for Harry Silverman, of the hearing held before Edward J. Ryan, Bankruptcy Judge, on the 19th day of December 1974.
>
> 2. From the Order of the Court dated January 21, 1975 approving the findings of fact and conclusions of law and compromise and settlement of certain controversies between the Trustee and Michael E. Green, Harry Green, Zelda Cohen, M. E. Green Co. Inc., a Florida corporation, Michael E. Green Company, a partnership and Michael E. Green as Trustee for Carol Green, Frances Green, Frank Green and Jonathan Green, and from the findings of fact and conclusions of law hereinbefore mentioned.
>
> 3. From the decision of Bankruptcy Judge Edward J. Ryan not to direct production of documents and memoranda during the course of the hearing held on August 27, 1974 pursuant to a Notice to Produce which was forwarded to various witnesses and parties to the proceeding." (Appellant's Notice of Appeal dated February 4, 1975)

Judge Pollack decided the motion to dismiss the appeal

appeal as follows:

> "Motion to Dismiss Appeal is Granted as to items "1" and "3" and denied as to "2".
>
> So Ordered
> 3/18/75
> Milton Pollack
> U.S.D.J.
>
> See: Rules 801, 802 Bankruptcy Rules and as to Item #2, See Hopkins v. McClure, 148 F. 2d 67, 69 (10th Cir. 1945) and City of Winter Haven v. Gillespie, 84 F. 2d 285; Ohio Central R.R. v. Central Trust Co., 133 U. S. 83; Thomson v. Wooster, 114 U. S. 104 (1885)."

A reading of JUDGE POLLACK's decision clearly discloses that items 1 and 3 as set forth in the Notice of Appeal, namely, the appeal from the denial of an application for an adjournment and the appeal from a ruling made August 27, 1974, have been dismissed. However, the determination of JUDGE POLLACK, although denying the motion to appeal the 2nd item of appeal relating to the January 21, 1975 Order of JUDGE RYAN, makes it abundantly clear that the appellant's right to appeal is severely limited.

On the motion before JUDGE POLLACK, the point was made that the appellant, having defaulted before JUDGE RYAN in his participation in the settlement and compromise hearing below, may not appeal, but is relegated to a motion before the Bankruptcy Judge to open his default.

JUDGE POLLACK in his determination found that there are certain cases where a defaulting party may have limited right of appeal. The learned Judge in his decision cited cases in support of such a limited right of appeal. A reading of these cases discloses that there is apparently an exception to the rule that a defaulting party may not appeal. This exception is that a defaulting party, such as the appellant herein, who seeks to prosecute an appeal, may prosecute a timely appeal from a default judgment but only to the extent that the judgment or order is not in conformity with the pleading or relief sought in the Court of original jurisdiction.

In the Hopkins v. McClure case cited by JUDGE POLLACK at page 69, the following appears:

> " * * * an aggrieved party may prosecute a timely appeal from a default judgment, but the distinct and positive averments in the complaint upon which judgment is rendered, are conclusively binding upon appellant, and insofar as the judgment conforms to the complaint, it is unassailable on appeal."

The analogy to the case at bar is striking. Manifestly, the appellant herein does not have a complete right of review of all the proceedings before JUDGE RYAN. All that he may do on this appeal is to seek a review solely to determine if the order of Bankruptcy Judge RYAN exceeds the relief requested

in the Petition below, or does not otherwise conform to the Petition below. The remainder of matters determined below, especially those relating to the factual allegations in the Petition, are as in the Hopkins v. McClure case, supra, "conclusively binding upon the appellant". To date, appellant has not claimed that the order appealed from exceeds the relief requested in the Petition, or it otherwise does not conform to the Petition. (See Pre-Argument Statement). Indeed, Appellant cannot so state because it is crystal clear that the Petition below is more than adequate, and that the order of January 21, 1975 is a proper order, based upon the Petition.

In the case of Peppers Fruit Co., 24 F. S. 119, Southern District, California 1938, the Court held:

> "* * * reviews from referees' orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein."

The appellant who is the sole objecting creditor and is not directly affected by the settlement, cannot use his own default as a basis for claiming a right of appeal. The order appealed is based upon a most thorough and complete record. Even if the record herein was not complete and fully adequate, it is nevertheless abundantly clear that appellant as a defaulting party may not challenge the facts and evidence adduced

at the hearing below which are "unassailable on appeal."

(Hopkins v. McClure, supra)

C O N C L U S I O N

THE APPEAL OF HARRY SILVERMAN SHOULD BE DISMISSED.

Respectfully Submitted,

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